84-289

No. _____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

DAVID MENDIA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the decision of the Court of Appeals for the Ninth Circuit ignored applicable Supreme Court and Court of Appeals precedent in affirming the trial court's denial of Petitioner's Motion to Suppress Illegally Obtained Evidence on the ground that he lacked standing on the theory of abandonment.

2. Whether the decision of the Court of Appeals for the Ninth Circuit affirming the trial court's refusal to grant judicial immunity ignores other Court of Appeals precedent and creates a conflict between the Ninth and Third Circuits' interpretation and evaluation of the important questions presented by Petitioner's Request for Immunity for defense witness.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
OPINION BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	6
I. THE DECISION BELOW IGNORES ESTABLISHED PRECEDENT WITH REGARD TO THE ISSUE OF STANDING TO ASSERT A FOURTH AMENDMENT VIOLATION AND THE THEORY OF ABANDONMENT IN LIGHT OF THE FACTS OF THE CASE	6
II. THERE IS A CONFLICT BETWEEN THE CIRCUITS OF THE UNITED STATES COURT OF APPEALS AND WITHIN THE NINTH CIRCUIT WITH REGARD TO THE IMPORTANT QUESTION OF COURT-ORDERED DEFENSE IMMUNITY	9
CONCLUSION	12

TABLE OF AUTHORITIES

Page

CASES

Brady vs. Maryland,
373 U.S. 83 (1963) 11

Byars vs. United States,
273 U.S. 29 (1927) 8

Government of Virgin Islands vs. Smith,
615 F.2d 964 (3rd Cir., 1980) 9,10,11

Robbins vs. California,
453 U.S. 420 (1980) 8

United States vs. Alessio,
528 F.2d 1079 (9th Cir., 1976) 9

United States vs. Astorga Torres,
682 F.2d 1331 (9th Cir., 1982) 7

United States vs. Carman,
577 F.2d 556 (9th Cir., 1978) 9,10

United States vs. Goshorn,
628 F.2d 697 (1st Cir., 1980) 8

United States vs. Herman,
589 F.2d 1191 (3rd Cir., 1978) 10,11

United States vs. Jackson,
544 F.2d 407 (9th Cir., 1976) 6

United States vs. Kendall,
655 F.2d 199 (9th Cir., 1981) 7

United States vs. Lord,
711 F.2d 887 (9th Cir., 1983) 2,5,9,10

United States vs. Nixon,
418 U.S. 683 (1974) 11

TABLE OF AUTHORITIES (Continued)

Page

CASES (Continued)

United States vs. Perez,
689 F.2d 1336 (9th Cir., 1982) 6,7,8

United States vs. Reyes,
595 F.2d 275 (5th Cir., 1979) 6

United States vs. Salvucci,
448 U.S. 82 (1980) 6

United States vs. Williams,
569 F.2d 823 (5th Cir., 1978) 7

CONSTITUTIONS

United States Constitution,
Amendment IV 2,6
Amendment V 2,11

STATUTES

United States Code, Title 18,
Section 3231 3
Sections 6002-6003 9,10

United States Code, Title 21,
Section 841(a)(1) 1,3
Section 846 1,3

United States Code, Title 28,
Section 1254(1) 2

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

DAVID MENDIA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, DAVID MENDIA, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Ninth Circuit entered on 22 June, 1984.

OPINION BELOW

On 27 April, 1984 the Court of Appeals filed its Opinion affirming Petitioner's conviction for violation of Title 21 United States Code § 841(a)(1) and § 846 [conspiracy to possess with intent to distribute heroin, a Schedule I controlled substance]. A copy of the Opinion of the United States Court of Appeals is attached as Appendix A.

On 22 June, 1984 the United States Court of Appeals filed an Order denying Appellant's Petition for Rehearing and rejecting the suggestion for rehearing en banc. A copy of that Order is attached as Appendix B.

On 30 July, 1984, the United States Court of Appeals filed an Order Amending Opinion and adding the citation of *United States vs. Lord*, 711 F.2d 887 (9th Cir., 1983). A copy of the Order Amending Opinion is attached as Exhibit C.

JURISDICTION

On 22 June, 1984 the United States Court of Appeals for the Ninth Circuit entered its Judgment rejecting the Petition for Rehearing and suggestion for rehearing en banc of its Judgment affirming the Petitioner's conviction, originally filed on 27 April, 1984. [See Appendices A and B] The jurisdiction of this Court is invoked pursuant to Title 28 United States Code § 1254(1).

On 27 June, 1984 a Motion to Stay the Issuance of the Mandate pending Application for Writ of Certiorari was filed in the Court of Appeals. As of the date of this Petition, there is no decision on the motion.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment V:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; . . .

STATUTORY PROVISIONS INVOLVED

Title 21 United States Code § 841(a)(1):

> (a) **UNLAWFUL ACTS** Except as authorized by this Title, it shall be unlawful for any person knowingly or intentionally -
>
> 1. To manufacture, distribute, or dispense, or possess with intent to manufacture, or distribute, or dispense, a controlled substance; . . .

Title 21 United States Code § 846:

> Any person who attempts or conspires to commit any offense defined in this Title is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

STATEMENT OF THE CASE

On 1 September, 1982 a four-count indictment was returned in the United States District Court for the Southern District of California in Criminal Case Number 82-0669-GT. The Petitioner was charged in Counts One and Three with conspiracy to possess with intent to distribute and possession of a controlled substance with intent to distribute, all in violation of Title 21 United States Code § 841(a)(1) and § 846; said offenses alleged to have occurred within the Southern District of California. The jurisdiction of the United States District Court for the Southern District of California was invoked pursuant to Title 18 United States Code § 3231.

On 11 April, 1982 at 4 p.m., Government informant Camacho telephoned Drug Enforcement Administration (DEA) Special Agent Antonio L. Huertas and informed him that he had just received 20 ounces of heroin from Anatolio Madrid-Cabrales [Petitioner's co-Defendant in the District Court]. Agent Huertas was also informed that Madrid had told Camacho that the selling price was $137,000.00. Agent Huertas proceeded to Camacho's residence and observed the heroin.

On 12 April, 1982 at 6 p.m., Agent Huertas took possession of the heroin from Camacho. On the next day, at 10:30 a.m., Agent Huertas returned the heroin to Camacho and instructed him to return it to Madrid. At 11:36 a.m. on 13 April, 1982, Madrid visited Camacho's residence and received the heroin which he took to his apartment. At 12:26 p.m., Government agents observed Petitioner David Mendia enter Madrid's apartment. Shortly thereafter, Special Agent Ray Cuevas watched as Petitioner Mendia exited Madrid's apartment and entered a 1974 Dodge. Government Agents observed Mendia drive directly to a parking lot of a nearby shopping center; enter the shopping center; park his car; and enter a camera shop. At 2:15 p.m., Agent Gus Vasquez entered this camera shop and observed Mendia standing near a counter, constantly looking around very nervously, and noticed bulges in Petitioner's front pockets.

Approximately three minutes later, Special Agent Brian Cook observed Mendia walk into a bar, Victor's II, which is adjacent to the International Camera Shop. Cuevas then entered the bar and observed that Mendia no longer had bulges in his front pants pockets. Cuevas watched Mendia make approximately four telephone calls and at 5:45 p.m., Government Agents observed Michael Leon Bronk enter the bar and meet with Petitioner Mendia.

At 6:00 p.m., Government Agents observed Bronk and Mendia leave the bar and walk directly to Mendia's Dodge automobile. Agent Chuck Jones observed Mendia open the hood of his vehicle and then observed Mendia walk into the camera shop, remain there approximately for two minutes, and then return and contact Bronk. Agent Cook then saw Bronk walk to a 1972 Dodge and open the trunk. Cook then saw Bronk drive away from the area leaving Petitioner behind.

At 6:30 p.m., pursuant to the direction of the DEA Agents, Deputy Sheriffs Butt and Southerland stopped Bronk and seized, without a search warrant, the 20 ounces of heroin from the trunk. The Government stipulated that the stop was a pretext. No criminal charges have been filed against Bronk by either State or Federal authorities as a result of the stop, search, and seizure.

Petitioner Mendia was not arrested until 24 August, 1982; pretrial motions to suppress the illegally obtained evidence and for an order conferring judicial immunity on an essential defense witness were filed in due course. Evidence was taken, and these motions were heard before the

Honorable Gordon Thompson, Jr., Judge of the United States District Court, Southern District of California, on 7 December, 1982 and 17 January, 1983.

The Motion to Suppress Illegally Obtained Evidence was denied on the ground that Petitioner Mendia lacked standing on the theory of abandonment and that he had no reasonable expectation of privacy in the property inasmuch as it had been abandoned.

The trial court denied Petitioner Mendia's motion to immunize a defense witness.

Petitioner did not bring a motion to dismiss pursuant to *United States vs. Lord*, 711 F.2d 887 (9th Cir., 1983), nor a motion to compel the Government to grant use immunity in the District Court.

Petitioner Mendia was convicted of Count One, the conspiracy count, following a non-jury trial based upon stipulated facts; and sentenced to imprisonment for five years.

Petitioner appealed the conviction and on appeal argued that he had standing to complain of the unconstitutional seizure inasmuch as he had a reasonable expectation of privacy with regard to, and a possessory interest in, the seized parcel. Petitioner asserted that there was no abandonment of the package; that the package was wrapped in a manner demonstrating his reasonable expectation of privacy; and that surveilling Government Agents knew of his possessory interest and expectation of privacy in the package at the time it was ordered illegally seized. Petitioner also argued that the denial of a grant of judicial immunity for an essential defense witness at the evidentiary hearing on the suppression motion constituted a denial of due process.

The United States Court of Appeals for the Ninth Circuit, in its Opinion, filed 27 April, 1984, affirmed the Petitioner's conviction, finding the District Court's conclusion that the Appellant had abandoned his reasonable expectation of privacy by relinquishing control of the heroin not clearly erroneous and that "a district court has neither the power to grant use immunity to individuals whom the defendant seeks to call as witnesses, nor the power to force the Government to grant such immunity." [See Appendix A]

REASONS FOR GRANTING THE WRIT

I

THE DECISION BELOW IGNORES ESTABLISHED PRECEDENT WITH REGARD TO THE ISSUE OF STANDING TO ASSERT A FOURTH AMENDMENT VIOLATION AND THE THEORY OF ABANDONMENT IN LIGHT OF THE FACTS OF THE CASE

In its decision, the United States Court of Appeals relied entirely upon the theory of abandonment in affirming the District Court's finding that Petitioner Mendia had no reasonable expectation of privacy in the package once it was turned over to Bronk. These findings and observations ignore important facts in the case which demonstrate that the relationship between Petitioner Mendia and the "mule" Bronk was such that Mendia had a reasonable expectation that the package would be returned to him.

The abandonment inquiry "is primarily a question of intent and intent must be inferred from words, acts, and other objective facts." *United States vs. Jackson*, 544 F.2d 407, 409 (9th Cir., 1976). The observations of Government Agents in this case confirm that Petitioner Mendia engaged in discussion with the "mule" Bronk for approximately two hours before Bronk left the parking lot with the heroin. Further, the Agents themselves knew precisely what Mendia was doing and what Bronk's role was as demonstrated during their testimony at the suppression hearing concerning the role of a "mule" and how that pattern fits with the facts in this case. In other words, the Agents knew the heroin was Mendia's and had been entrusted to Bronk for eventual return to the Petitioner; even though Bronk drove away, leaving Petitioner behind, with no apparent control over the contraband.

"A person may have a legitimate expectation of privacy in a place or object he does not own." *United States vs. Perez*, 689 F.2d 1336 (9th Cir., 1982) citing *United States vs. Reyes*, 595 F.2d 275, 278 (5th Cir., 1979) and citing this Court's decision in *United States vs. Salvucci*, 448 U.S. 82 (1980) to the effect that this Court has repeatedly repudiated the notion that "arcane distinctions developed in property and tort law" ought to control our Fourth Amendment inquiry. Perhaps the record in this case would be clearer if it included the testimony of the "mule" Bronk. However, the District Court denied the defense motion for

immunity for Bronk; depriving Petitioner of valuable and apparently, essential evidence in light of the opinion by the Court of Appeals with regard to the issue of intent.

The Ninth Circuit recognized the standard for ascertaining the reasonable expectation of privacy as an objective one. *United States vs. Kendall*, 655 F.2d 199, 201 (9th Cir., 1981) Objectively, there is a vast difference between earlier cases decided by the Court of Appeals and Petitioner's case. In this case, Petitioner placed a package in the trunk of a friend's car with whom he had just spent two hours and whom surveilling DEA Agents knew to be a "mule" with the specific task of taking the package away from the Petitioner and returning it to Petitioner shortly thereafter apparently in the hope that surveillance would be interrupted in the meantime.

In *United States vs. Williams*, 569 F.2d 823 (5th Cir., 1978) agents followed a truck and trailer driven by Williams and believed to contain marijuana. Williams apparently became aware he was being followed and pulled into a roadside rest stop, unhitched the unlocked trailer, and left. The Court found such conduct a transparent abandonment of the tight grip of ownership and reliance solely on a feeble hope of reacquisition.

In *United States vs. Astorga Torres*, 682 F.2d 1331 (9th Cir., 1982), the issue of abandonment was confronted where condoms containing heroin were flushed down a toilet during a shootout with DEA Agents who had knocked on a cabin door and demanded entry. The shootout was followed by surrender of those individuals in the cabin and found in the toilet of the cabin where several papers and a wallet. Under these circumstances, the Court found there was a "clear abandonment" of the documents in the toilet.

Astorga and *Williams* are easily distinguished from the situation in this case where the parcel is not thrown away or placed in a public place without security. Here, the parcel is placed, by Petitioner, into the locked trunk of a car driven by a friend.

The Court of Appeals cites *United States vs. Perez*, 689 F.2d 1336 (9th Cir., 1981) for the proposition that the Defendants in that case "took reasonable precautions to maintain their privacy interest" and concluded that a similar element of control is lacking in this case. Unfortunately, because the District Court denied the defense motion for immunity for

the "mule," Bronk, the facts and circumstances with regard to the control issue could not be fully presented. There are no facts in the record which support the proposition that Petitioner Mendia was not in a similar situation of control as were the Defendants in *Perez*. To the contrary, all of the evidence in the record suggests that Mendia did maintain control over the "mule" Bronk. The extent of that control, however, is unclear absent the testimony of the "mule" himself.

In its opinion, the Court of Appeals does not address the fact that the package was wrapped in a manner which demonstrated the Petitioner's privacy expectation in the contents. Government Agents testified that they saw the Petitioner place the opaque bright plastic bag into the trunk of Bronk's vehicle and Petitioner has asserted his personal interest in the contents of that package throughout. This Court has ruled in *Robbins vs. California*, 453 U.S. 420 (1980) that paper bags, small packages, and other parcels wrapped in a manner so as to demonstrate a reasonable expectation of privacy, require a warrant prior to search. The opaqueness of the packing material in this case, clearly demonstrated an expectation of privacy with regard to the contents.

The First Circuit in *United States vs. Goshorn*, 628 F.2d 697 (1st Cir., 1980) stated that:

> Ownership and possession, while not dispositive of expectation of privacy, are relevant factors in this regard. Since Appellee was not the registered owner of the valiant, he was required to establish his personal interest in the parcel by asserting *either that he had placed it in the trunk* or that he had such possessory interest in the contents of the bag. (*Id.* page 701; emphasis added)

Petitioner's conduct, observed by Government Agents, in placing the opaque bag into the trunk of Bronk's car established his possessory interest and his reasonable expectation of privacy in the contents of the package. Furthermore, the agents had surveilled that particular package for several days and they knew that the Petitioner had a possessory interest and an expectation of privacy in its contents.

In *Byars vs. United States*, 273 U.S. 28 (1927), this court held that:

> . . . The Court must be vigilant to scrutinize the attendant facts with an eye to detect and a hand to prevent violations of the constitution by circuitous and indirect methods.

This Court must exercise its supervisory power to correct the Ninth Circuit's departure from established law and failure to consider the entire record, including all of the facts and circumstances before it in deciding this important issue.

II

THERE IS A CONFLICT BETWEEN THE CIRCUITS OF THE UNITED STATES COURT OF APPEALS AND WITHIN THE NINTH CIRCUIT WITH REGARD TO THE IMPORTANT QUESTION OF COURT-ORDERED DEFENSE IMMUNITY

In its Opinion, the United States Court of Appeals for the Ninth Circuit holds that the District Court lacks any power to grant witness immunity, nor the power to force the Government to grant immunity. In so ruling, the Court creates conflict with its decisions in *United States vs. Alessio*, 528 F.2d 1079 (9th Cir., 1976); *United States vs. Carman*, 577 F.2d 556 (9th Cir., 1978); and *United States vs. Lord*, 711 F.2d 887 (9th Cir., 1983). As a result of the Opinion in this case, a conflict also arises between the Ninth Circuit and the Third Circuit ruling in *Government of Virgin Islands vs. Smith*, 615 F.2d 964 (3rd Cir., 1980).

Petitioner concedes that in the District Court, he did not move to dismiss, nor ask the Court to direct the Government to grant immunity pursuant to Title 18 United States Code §§ 6002-6003. The request was only for judicial immunity.

In *Alessio, supra*, the Ninth Circuit held that the key question in granting immunity is whether the appellant was denied a fair trial. While immunity was not ordered on the facts in *Alessio*, the Court did not foreclose the availability of a discretionary grant of immunity.

In *Carman, supra*, the Ninth Circuit followed the same reasoning as in *Alessio* confirming the district court's power to grant immunity.

In *Lord, supra*, the Ninth Circuit held that the District Court has discretion to order the prosecution to invoke provisions for witness immunity under Title 18 United States Code §§ 6002-6003 or face a dismissal in the criminal case. In *Lord* the court distinguished its facts from *Carman* citing an aspect of possible prosecutorial misconduct and holding that if Government action resulted in unavailability of a witness which interfered with a defendant's exercise of his due process rights then, indeed, the court may dismiss a case if the government refused to extend use immunity to the necessary witness.

In *United States vs. Herman*, 589 F.2d 1191 (3rd Cir., 1978), that Court of Appeals held, "In certain cases, a court may have inherent authority to effectuate a defendant's compulsory process right by conferring a judicially fashioned immunity upon a witness whose testimony is essential to an effective defense." (*Id.* page 1193.) Although the court found the facts of that case insufficient to warrant conferring immunity, two years later in *Government of Virgin Islands vs. Smith*, 615 F.2d 964 (3rd Cir., 1980) the Third Circuit authorized the grant of such use immunity. The Third Circuit established guidelines for judicial immunity:

1. Immunity was properly sought in the district court;

2. The witness is avialable to testify;

3. The proferred testimony is both essential and clearly exculpatory; and

4. No strong governmental interests counterveil against the grant of immunity.

This case is ideal for a grant of judicially fashioned immunity:

1. Immunity was timely sought in the District Court;

2. Bronk was available to testify;

3. Bronk's testimony was critical to the issue of standing and intent to abandon;

4. Although they could have, no prosecutorial agency had filed charges against Bronk as of December, 1982; eight months following his seizure; and

5. By not charging Bronk, the Government had essentially made him unavailable as a witness to the defense inasmuch as Bronk would have asserted his Fifth Amendment privilege if called.

In its Opinion in this case, the Court of Appeals does not evaluate or analyze the due process claim in support of the request for immunity as suggested by the case law of the Ninth Circuit. Further, the Court of Appeals did not consider the request for immunity within the ambit of that contemplated by the Third Circuit in its decisions in *Smith* and *Herman*.

Instead, this Court of Appeals, without reaching the ultimate analysis suggested by existing case law, has decided that a request for immunity is beyond the power of the district court notwithstanding a due process evaluation.

The Opinion ignores the precedent of this court in *Brady vs. Maryland*, 373 U.S. 83 (1963) and *United States vs. Nixon*, 418 U.S. 683 (1974) where this court held that:

> The impedement that an absolute, unqualified [executive branch] privilege would place in the way of the primary duty of the judicial branch to do justice in criminal prosecutions would plainly conflict with the functions of the courts under Article III. *United States vs. Nixon, supra* at 707. (Bracketed material added)

This Court must exercise its supervisory power to correct the conflict within the Ninth Circuit; the conflict between the Third and Ninth Circuits; and the Ninth Circuit's substantial departure from established due process precedent.

CONCLUSION

For the foregoing reasons, Petitioner David Mendia respectfully requests that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Ninth Circuit.

DATED: August 20, 1984

Respectfully submitted,

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Attorney for Petitioner
DAVID MENDIA

APPENDICES

For Publication

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PHILLIP B. WINBERRY
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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

DAVID MENDIA,

Defendant-Appellant.

No. 83-5126
D.C. # CR 82-0669

OPINION

Appeal from the United States District Court
for the Southern District of California
Gordon Thompson, Jr., District Judge, Presiding
Argued and submitted December 5, 1983

Before: GOODWIN, WALLACE and TANG, Circuit Judges.

TANG, Circuit Judge:

Appellant David Mendia appeals his conviction for possession with intent to distribute heroin in violation of 21 U.S.C. § 841(a)(1) and § 846. He challenges the trial court's ruling that the seizure of evidence from the trunk of a third party's automobile did not invade his fourth amendment rights and was admissible against him. He also claims he was denied a fair trial because the district court refused to grant immunity to a prospective defense witness whom appellant alleges would have offered testimony sufficient to show that he retained a reasonable expectation of privacy in the contents of the third party's trunk such that the seizure violated his fourth amendment rights. We affirm.

Background

As part of a surveillance operation in April of 1982, Drug Enforcement Administration (DEA) agents followed the appellant as he left the apartment of a suspected drug dealer. Agents followed the appellant to a shopping center where he was seen entering a camera shop and then an adjacent bar. Inside the bar, appellant made several phone calls. About three hours later, Michael Leon Bronk met the appellant in the bar. Bronk and the appellant came out of the bar. While Bronk waited near the appellant's car, the appellant reentered the bar and returned two minutes later. Bronk was observed opening the trunk of his car and throwing a light colored object inside. Bronk then got in the car and drove away.

DEA agents requested sheriffs officers to stop Bronk's vehicle. After stopping Bronk, the sheriffs opened the trunk and found 20 ounces of heroin.

The appellant was charged with conspiracy to possess with intent to distribute a controlled substance under 21 U.S.C. §§ 841(a)(1) and 846. At trial, appellant sought to have the heroin suppressed, but the district court denied the motion, concluding that the appellant lacked standing to challenge the search of Bronk's vehicle. Appellant's motion to secure judicial immunity for Bronk was also denied.

Fourth Amendment

Mendia appeals the district court's ruling that he demonstrated no violation of his fourth amendment rights in the search and seizure from Bronk's vehicle because he had abandoned any reasonable expectation of privacy in the heroin by turning it over to Bronk. To show a seizure violated his fourth amendment rights, a criminal defendant must demonstrate a reasonable expectation of privacy in the item seized. *United States v. Perez*, 644 F.2d 1299, 1303 (9th Cir. 1981). Abandonment of the seized item, however, may extinguish the defendant's reasonable privacy expectations. *See United States v. Perez*, 689 F.2d 1336, 1338 (9th Cir. 1982) (per curiam). The abandonment inquiry "is primarily a question of intent, and intent may be inferred from words, acts, and other objective facts." *United States v. Anderson*, 663 F.2d 934, 938 (9th Cir. 1981), quoting *United States v. Jackson*, 544 F.2d 407, 409 (9th Cir. 1976). A trial court's determination of abandonment is a

factual issue and will not be reversed unless it is clearly erroneous. *United States v. Kendall*, 655 F.2d 199, 203 (9th Cir.), *cert. denied*, 455 U.S. 941 (1981).

The trial court determined that the appellant had abandoned his reasonable expectations of privacy in the heroin by turning it over to Bronk and making no effort to follow Bronk after Bronk drove away with the heroin in his trunk. In *United States v. Perez*, 689 F.2d 1336, this court found three defendants had demonstrated a violation of their fourth amendment rights in the seizure of narcotics from the gas tank of a truck they did not own because they maintained a proprietary interest in the narcotics by having one defendant ride in the vehicle and the two others follow it. By keeping the truck under surveillance, the defendants "took reasonable precautions to maintain their privacy interest." *Id.* at 1338. A similar element of control is lacking in this case. After giving the heroin to Bronk, the appellant made no effort to follow Bronk or maintain surveillance over the transportation of the heroin. The district court's conclusion that the appellant had abandoned his reasonable expectation of privacy by relinquishing control of the heroin is not clearly erroneous.

Witness Immunity

The appellant contends, however, that testimony from Bronk could establish the existence of an arrangement to return the heroin to the appellant. Appellant suggests that this arrangement, when proven, would demonstrate that he maintained a privacy interest in the heroin even though he had completely relinquished physical control of the heroin after turning it over to Bronk. Thus, appellant claims that the district court's refusal to grant immunity to Bronk effectively denied the appellant a fair trial.

What the appellant requests, however, is beyond the power of the district court to grant. "A defendant has no absolute right to elicit testimony from any witness, codefendant or not, whom he may desire." *United States v. Carman*, 577 F.2d 556, 561 (9th Cir. 1978). More importantly, however, the decision to grant immunity to prospective defense witnesses is left to the discretion of the executive branch. *United States v. Alessio*, 528 F.2d 1079 (9th Cir.), *cert. denied*, 426 U.S. 948 (1976). "To interpret the Fifth and Sixth Amendments as conferring on the defendant the power to demand immunity for co-defendants,

potential co-defendants, or otheres whom the government might in its discretion wish to prosecute would unacceptably alter the historic role of the Executive Branch in criminal prosecutions." *Id.* at 1082. Lacking the authority to foreclose executive branch discretion in this area, a district court has neither the power to grant use immunity to individuals whom the defendant seeks to call as witnesses, nor the power to force the government to grant such immunity. *United States v. Richardson*, 588 F.2d 1235, 1241 (9th Cir. 1978); *United States v. Benveniste*, 564 F.2d 335, 339 n.4 (9th Cir. 1977); *United States v. Jenkins*, 470 F.2d 1061 (9th Cir. 1972), *cert. denied*, 411 U.S. 920 (1973).

AFFIRMED.

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. DAVID MENDIA, Defendant-Appellant.	No. 83-5126 ORDER

Before: GOODWIN, WALLACE and TANG, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. DAVID MENDIA, Defendant-Appellant.	No. 83-5126 **ORDER AMENDING OPINION**

Before: GOODWIN, WALLACE and TANG, Circuit Judges.

The opinion of this case is amended by adding the following to the last paragraph on slip page 1879:

> Cf. *United States v. Lord*, 711 F.2d 887 (9th Cir. 1983) (propriety of dismissal when prosecutorial misconduct creates defense witness unavailability).

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No. 84-289

In the Supreme Court of the United States

OCTOBER TERM, 1984

DAVID MENDIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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15 pp

QUESTIONS PRESENTED

1. Whether petitioner's Fourth Amendment rights were violated by the search of a package found in an associate's car.

2. Whether the district court properly denied petitioner's request for "judicial immunity" for a defense witness.

TABLE OF CONTENTS

Page

Opinion below 1

Jurisdiction 1

Statement 1

Argument 4

Conclusion 8

TABLE OF AUTHORITIES

Cases:

Autry v. *Estelle*, 706 F.2d 1394, cert. denied, No. 83-5720 (Mar. 13, 1984) 5

Daley, In re, 549 F.2d 469, cert. denied, 434 U.S. 829 6

Government of Virgin Islands v. *Smith*, 615 F.2d 964 ..... 6, 7

McCray v. *Illinois*, 386 U.S. 300 7

Pillsbury Co. v. *Conboy*, 459 U.S. 248 5

Rakas v. *Illinois*, 439 U.S. 128 4

Rawlings v. *Kentucky*, 448 U.S. 98 4

Roviaro v. *United States*, 353 U.S. 53 7

Simmons v. *United States*, 390 U.S. 377 ..... 4, 7

Thompson v. *Garrison*, 516 F.2d 986, cert. denied, 423 U.S. 933 6

United States v. *Alessio*, 528 F.2d 1079, cert. denied, 426 U.S. 948 6

Page

Cases—Continued:

United States v. *Allstate Mortgage Corp.*, 507 F.2d 492, cert. denied, 421 U.S. 999 6

United States v. *Bazzano*, 712 F.2d 826 7

United States v. *Caldwell*, 543 F.2d 1333 6

United States v. *Doe*, No. 82-786 (Feb. 28, 1984) 5

United States v. *Gottesman*, 724 F.2d 1517 5

United States v. *Graham*, 548 F.2d 1302 6

United States v. *Hardrich*, 707 F.2d 992, cert. denied, No. 82-6986 (Nov. 28, 1983) 5

United States v. *Heffington*, 682 F.2d 1075, cert. denied, 459 U.S. 1108 5

United States v. *Herbst*, 641 F.2d 1161, cert. denied, 454 U.S. 851 6

United States v. *Hunter*, 672 F.2d 815 5-6

United States v. *Karas*, 624 F.2d 500, cert. denied, 449 U.S. 1078 6

United States v. *Klauber*, 611 F.2d 512, cert. denied, 446 U.S. 908 6

United States v. *Lenz*, 616 F.2d 960, cert. denied, 447 U.S. 929 6

United States v. *L'Hoste*, 640 F.2d 693 6

United States v. *Lowell*, 649 F.2d 950 7

United States v. *Pennell*, No. 83-1243 (6th Cir. June 8, 1984) 5

Page

Cases—Continued:

United States v. *Richardson*, 588 F.2d 1235, cert. denied, 440 U.S. 947 6

United States v. *Ross*, 456 U.S. 798 5

United States v. *Salvucci*, 448 U.S. 83 4

United States v. *Taylor*, 728 F.2d 930 5

United States v. *Thevis*, 665 F.2d 616, cert. denied, 456 U.S. 1008 6

United States v. *Todaro*, No. 84-1086 (2d Cir. Sept. 11, 1984) 5

United States v. *Turkish*, 623 F.2d 769, cert. denied, 449 U.S. 1077 6

Wisniewski v. *United States*, 353 U.S. 901 6

Constitution and statutes:

U.S. Const. Amend. IV 5

18 U.S.C. 6001 *et seq.* 5

21 U.S.C. 841(a)(1) 1

21 U.S.C. 846 1

Miscellaneous:

Note, *The Case Against a Right to Defense Witness Immunity*, 83 Colum. L. Rev. 139 (1983) 6

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-289

DAVID MENDIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A4) is reported at 731 F.2d 1412.

JURISDICTION

The judgment of the court of appeals was entered on April 27, 1984. A petition for rehearing was denied on June 22, 1984 (Pet. App. B1). The petition for a writ of certiorari was filed on August 20, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a non-jury trial on stipulated facts in the United States District Court for the Southern District of California, petitioner was convicted of conspiring to possess heroin with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 846. He was sentenced to five years' imprisonment. The court of appeals affirmed (Pet. App. A1-A4).

1. The evidence at the suppression hearing showed that on March 3, 1982, co-defendant Anatolio Madrid Cabrales sold an ounce of heroin to DEA undercover agent Antonio Huertas. On March 4, Madrid told government informant Jose Angel Camacho that he was going to pay petitioner for the heroin that he had sold to Huertas. Later that day, DEA agents saw Madrid meet with petitioner at a shopping center parking lot. E.R. 58-59.[1]

On April 1, 1982, Madrid delivered 20 ounces of heroin to Camacho and told him that the selling price was $137,000. On April 12, Camacho gave the heroin to Huertas, who conducted a chemical test of the substance and photographed it. The next day Huertas gave the heroin back to Camacho and told him to return it to Madrid and explain that there would be a delay in the transaction. Approximately one hour later, Madrid went to Camacho's residence to retrieve the heroin and took it to his apartment. Pet. 3-4; Tr. 8; E.R. 59.

Shortly thereafter, petitioner entered Madrid's apartment. Petitioner soon left the apartment and drove in his car to a nearby shopping center. DEA agents observed petitioner park his car and go into a camera shop. At approximately 2:15 p.m., a DEA agent entered the shop and saw that petitioner was looking around nervously and had large bulges in both of his front pockets. Pet. 4; E.R. 59-60.

A few minutes later, petitioner left the camera shop and went to an adjacent bar. DEA agents noticed that petitioner no longer had bulges in his front pockets. The agents believed that petitioner was waiting for someone, because

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[1]"E.R." refers to petitioner's excerpts of record filed in the court of appeals.

he kept looking at the entrance to the bar, and that petitioner was aware of the surveillance. Pet. 4; Tr. 42, 50-51; E.R. 60.

At approximately 5:45 p.m., Michael Leon Bronk arrived at the bar. Petitioner immediately went up to Bronk and gave him money for a telephone call. After spending a few minutes in the bar, petitioner and Bronk left at approximately 6:00 p.m. Pet. 4; Tr. 43; E.R. 60.

Upon leaving the bar, petitioner and Bronk walked over to petitioner's car. Petitioner opened the hood and then, while Bronk remained by the car, entered the camera shop. After being in the camera shop for approximately two minutes, petitioner returned to the parking lot. He and Bronk then went to Bronk's car, where Bronk opened the trunk and threw a light colored object inside. At that point, Bronk drove away in his car, leaving petitioner in the parking lot. Pet. 4; Tr. 25; E.R. 60.

Soon after he left the shopping center, Bronk was stopped by the local police at the request of the DEA agents. The police found the 20 ounces of heroin in a bright yellow plastic bag in the trunk of Bronk's car. Pet. 4; Tr. 7, 25-26, 28; E.R. 60.

2. Neither petitioner nor Bronk testified at the suppression hearing. The district court denied petitioner's motion to grant judicial immunity to Bronk as a defense witness.

Based on the record at the suppression hearing, the district court rejected petitioner's motion to suppress the heroin located in Bronk's car. The court found that petitioner had no reasonable expectation of privacy in the package of heroin because he had transferred it to Bronk and thus lost control over it (Tr. 55-56).

3. The court of appeals affirmed (Pet. App. A1-A4). The court upheld the district court's finding that petitioner had abandoned any reasonable expectation of privacy he might

have had by transferring the package to Bronk and maintaining no control over it (*id.* at A2-A3). The court also concluded that the district court had correctly denied petitioner's request for judicial immunity for Bronk to testify as a defense witness on the issue of "standing" at the suppression hearing (*id.* at A3-A4).

ARGUMENT

1. Petitioner contends (Pet. 6-9) that he had a reasonable and legitimate expectation of privacy in the bag of heroin that was found in the trunk of Bronk's car.[2] However, the district court found on the facts of this case that petitioner relinquished any privacy interest when he delivered the bag to Bronk and made no effort to keep control of it, which finding was sustained by the court of appeals. This fact-bound ruling is correct and in any event does not warrant further review.

Petitioner disputes the lower courts' findings on the ground that the DEA agents "knew" that Bronk was a "mule" who would eventually return the heroin to petitioner. However, as the district court recognized (Tr. 55-56), any such "subjective intent" on petitioner's part would not establish a reasonable expectation of privacy during the time that "sole control was with Bronk." At any rate, the record fails to support petitioner's assertion. Petitioner did not testify at the suppression hearing even though his privilege against self-incrimination would have been protected under *Simmons* v. *United States*, 390 U.S. 377 (1968); see also *United States* v. *Salvucci*, 448 U.S. 83, 89-90 (1980). Having failed to avail himself of the opportunity to explain any "arrangement" with Bronk, petitioner cannot now claim that he had an expectation of privacy based on an

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[2]Petitioner does not and could not argue that he had any privacy interest in Bronk's car itself. See *Rawlings* v. *Kentucky*, 448 U.S. 98 (1980); *Rakas* v. *Illinois*, 439 U.S. 128 (1978).

assumption that the agents knew that Bronk was only a temporary "mule."[3]

2. Petitioner also argues (Pet. 9-11) that the district court erred in not judicially immunizing Bronk as a prospective defense witness at the suppression hearing. He concedes (Pet. 5, 9) that he never asked the district court to dismiss the indictment or to order the government to grant immunity under 18 U.S.C. 6001 *et seq.*, and thus his sole claim is that the district court has inherent immunity power that should have been exercised in this case. Petitioner's argument is without merit.

The decision whether or not to confer immunity on a witness is entrusted to the Executive Branch and is ill-suited for consideration by the courts. See *United States* v. *Doe*, No. 82-786 (Feb. 28, 1984), slip op. 11; *Pillsbury Co.* v. *Conboy*, 459 U.S. 248, 254, 261-262 (1983). The courts of appeals have overwhelmingly concluded that the judiciary is not authorized to immunize witnesses, and this Court has consistently declined review.[4]

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[3]We also believe that, even if petitioner had "standing," the heroin seized from Bronk's car was admissible against him. Despite his pejorative characterization (see Pet. 4), petitioner plainly has no standing to challenge the seizure of Bronk entailed in the stop of his car. Moreover, as outlined above (see pages 2-3, *supra*), there was ample probable cause to believe that the car contained heroin. In these circumstances, under *United States* v. *Ross*, 456 U.S. 798 (1982), the search of the bag contained in the trunk of Bronk's car was proper and did not violate petitioner's or Bronk's Fourth Amendment rights.

[4]See, *e.g.*, *United States* v. *Todaro*, No. 84-1086 (2d Cir. Sept. 11, 1984), slip op. 6201-6205; *United States* v. *Pennell*, No. 83-1243 (6th Cir. June 8, 1984), slip op. 7-13; *United States* v. *Taylor*, 728 F.2d 930, 933-936 (7th Cir. 1984); *United States* v. *Gottesman*, 724 F.2d 1517, 1523-1524 (11th Cir. 1984); *United States* v. *Hardrich*, 707 F.2d 992, 993-994 (8th Cir. 1983), cert. denied, No. 82-6986 (Nov. 28, 1983); *Autry* v. *Estelle*, 706 F.2d 1394 (5th Cir. 1983), cert. denied, No. 83-5720 (Mar. 13, 1984); *United States* v. *Heffington*, 682 F.2d 1075, 1080-1081 (5th Cir. 1982), cert. denied, 459 U.S. 1108 (1983); *United States* v. *Hunter*,

As petitioner points out (Pet. 9), the Third Circuit has held that district courts have the authority to order immunity for prospective defense witnesses in exceptional circumstances. See *Government of Virgin Islands* v. *Smith*, 615 F.2d 964 (3d Cir. 1980). The Third Circuit stands alone in so holding and, as noted above, this Court has repeatedly declined to review the issue notwithstanding the divergent view of the Third Circuit; no different result is called for here.[5]

Moreover, even under the Third Circuit's standard, petitioner could not prevail. By its terms, the Third Circuit's rule is applicable only where, among other requirements, "the defendant * * * make[s] a convincing showing * * * that the testimony which will be forthcoming is both clearly exculpatory and essential to the defendant's case."

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672 F.2d 815, 818 (10th Cir. 1982); *United States* v. *Thevis*, 665 F.2d 616, 638-641 (5th Cir.), cert. denied, 456 U.S. 1008 (1982); *United States* v. *L'Hoste*, 640 F.2d 693, 695 (5th Cir. 1981); *United States* v. *Herbst*, 641 F.2d 1161 (5th Cir.), cert. denied, 454 U.S. 851 (1981); *United States* v. *Karas*, 624 F.2d 500, 505 (4th Cir. 1980), cert. denied, 449 U.S. 1078 (1981); *United States* v. *Turkish*, 623 F.2d 769, 771-779 (2d Cir. 1980), cert. denied, 449 U.S. 1077 (1981); *United States* v. *Lenz*, 616 F.2d 960, 962 (6th Cir.), cert. denied, 447 U.S. 929 (1980); *United States* v. *Klauber*, 611 F.2d 512, 517-520 (4th Cir. 1979), cert. denied, 446 U.S. 908 (1980); *United States* v. *Richardson*, 588 F.2d 1235, 1241 (9th Cir. 1978), cert. denied, 440 U.S. 947 (1979); *In re Daley*, 549 F.2d 469, 479-480 (7th Cir.), cert. denied, 434 U.S. 829 (1977); *United States* v. *Graham*, 548 F.2d 1302, 1315 (8th Cir. 1977); *United States* v. *Caldwell*, 543 F.2d 1333, 1356 n.115 (D.C. Cir. 1974); *United States* v. *Alessio*, 528 F.2d 1079, 1081-1082 (9th Cir), cert. denied, 426 U.S. 948 (1976); *Thompson* v. *Garrison*, 516 F.2d 986, 988 (4th Cir.), cert. denied, 423 U.S. 933 (1975); *United States* v. *Allstate Mortgage Corp.*, 507 F.2d 492, 494-495 (7th Cir.), cert. denied, 421 U.S. 999 (1974); see also Note, *The Case Against a Right to Defense Witness Immunity*, 83 Colum. L. Rev. 139 (1983).

[5]Petitioner's assertion of an intra-circuit conflict within the Ninth Circuit (Pet. 9-10) also does not call for this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957).

Government of Virgin Islands v. *Smith*, 615 F.2d at 972. Thus, there must be "a probable certainty that * * * [the] expected testimony * * * would * * * *in itself* exonerate [the defendant]." *United States* v. *Lowell*, 649 F.2d 950, 965 (3d Cir. 1981). See also *United States* v. *Bazzano*, 712 F.2d 826, 851 (3d Cir. 1983) (en banc) (Adams, J., dissenting from the judgments of affirmance). Here, Bronk's testimony would have related merely to petitioner's "standing" to seek the suppression of evidence, not to his guilt or innocence of the charges against him. Cf. *McCray* v. *Illinois*, 386 U.S. 300 (1967); compare *Roviaro* v. *United States*, 353 U.S. 53 (1957). In addition, Bronk's testimony was hardly essential since, under *Simmons* v. *United States*, *supra*, petitioner himself was free to testify at the suppression hearing about the existence and nature of any arrangement he had with Bronk. And in any event the district court's ruling suggests that petitioner's motion to suppress would have been denied even if Bronk had testified about an agreement to return the heroin to petitioner at some later time (see Tr. 55-56). Thus, this case is a far cry from the unique situation in *Smith*, in which the Third Circuit found judicial immunity for a defense witness to be appropriate.[6]

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[6]In *Smith*, the defendant requested the court to confer immunity on an exculpatory witness, a juvenile subject exclusively to the jurisdiction of local Virgin Islands authorities. The local authorities offered the witness immunity, but, as a matter of prosecutorial courtesy, stated that the offer was conditional on the consent of the United States Attorney, who inexplicably refused to consent.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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